SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 912

FRED TOYOSABURO KOREMATSU

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

323453—43

1 United States Circuit Court of Appeals for the Ninth Circuit

No. 10248

FRED TOYOSABURO KOREMATSU, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Statement of facts

This cause began in an information filed by the United States Attorney for the Northern District of California in the United States District Court for that district. The information reads.

"Leave of Court being first had, Frank J. Hennessy, United States Attorney for said District, comes, and for the United States of America informs this Court: that Fred Toyosaburo Korematsu (hereinafter called 'said defendant'), being at all the times herein mentioned a person of Japanese ancestry, and being within the geographical limits of Military Area No.

2 1 as said Area is defined and described in Proclamation No. 1, dated March 2, 1942, issued by J. L. DeWitt, Commanding General, Western Defense Command, and Military Commander designated by the Secretary of War, pursuant to Executive Order No. 9066 of the President of the United States, dated February 19, 1942, did, on or about the 30th day of May 1942, at the City of San Leandro, County of Alameda, State of California, within said division and district, and within the geographical limits of Area No. 1, unlawfully, willfully and knowingly commit an act contrary to the order of the Secretary of War and of such Military Commander, in that he, the said defendant, was, at said time and place, and did, at said time and place, remain in that portion of Military Area No. 1

covered by Civilian Exclusion Order No. 34 of said Commanding General, J. L. DeWitt, issued on May 3, 1942, in which all persons of Japanese ancestry are excluded from, and not permitted to remain in, the said City of San Leandro, County of Alameda, State of California, after 12 o'clock, noon, P. W. T. May 9, 1942; that at said time said defendant knew of the existence of said restrictions and order, and that his said act was in violation thereof."

Jury was waived and Korematsu was tried and found guilty by the district court. The court, on September 8, 1942, made its order that

"* * * the defendant, Fred Toyosaburo Korematsu, be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended."

Appellant appealed from the order to this court, an appeal duly taken if we have the jurisdiction to consider it.

Thereafter, on December 23rd and December 29th,
3 1942, appellant moved in the district court "that sentence now be passed upon him." The district court found that "no request was made for the imposition of sentence at the time of trial." The record shows no request of appellant to be placed on probation. The district court denied the motion to impose sentence.

Appellee raises the question whether an order so imposing probation is a "final decision" of the district court within the jurisdiction of our review provided in section 128 of the Judicial Code, 28 U. S. C. A. 225.[1]

We are confronted with decisions of two circuits, the Second and Fifth, holding opposing views as to the appealability of such an order.

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[1] § 225. (Judicial Code, section 128.) Appellate jurisdiction.

(a) Review of final decisions.—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

* * * * *

The Second Circuit holds not appealable an order for probation without a sentence for a time period. It considered its character and dismissed the appeal. United States v. Lecato, 29 F. (2d) 694, 695. The Fifth Circuit considered such an appeal and affirmed the order. Cooper v. United States, 91 F. (2d) 195, 199.

4 The opinions show the divergence between the two circuits. In the Second Circuit case the convicted man had not demanded a specific sentence for a term of imprisonment. The opinion states,

"The appeal from the suspension of sentence was premature. The only judgment in a criminal prosecution is the sentence, and when sentence is suspended there is no judgment from which to appeal. This has been substantially the uniform ruling whenever the question has arisen, in the absence of some statute allowing an appeal. * * *

"* * * Nor is there any serious injustice involved; a defendant may at any time insist upon the imposition of sentence, if so minded, and if he prefers to remain under probation rather than to take his chances, no grave evil results. At any rate, if it be thought desirable that he should have an appeal, the law is too well settled for us to change it." United States v. Lecato, 29 F. (2d) 694,695.

In the Fifth Circuit the convicted men, Will and Johnny Cooper, demanded such sentences. The district court refused to impose them but instead ordered probation. On appeal, the court affirmed the order, treating probation as a punishment which the court could order despite demand for the usual sentence. Its opinion states that probation

"* * * is an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose. We do not agree with appellants' contention that probation, like pardon, may be refused by the convicted person. The

5 act vests a discretion in the Court, not a choice in the convict. The probation here imposed is rather loose and informal, but is authorized by the act.

"The judgment is accordingly affirmed as to Will Cooper and Johnny Cooper, * * *." Cooper v. United States, 91 F. (2d) 195,199.

In neither case was certiorari applied for. The conflict in the circuits, one dismissing and the other affirming the appeal, not only would be heightened by our decision but would subject the appellant, now under the restraint of the probation order and demanding an immediate sentence of imprisonment or fine, to the delay and expense of petitioning for certiorari, most likely to be granted under Supreme Court Rule 38, paragraph 5 (a). Appellant well may find a decision on certiorari postponed until the October Term of the Supreme Court.

This Court, sitting en banc, is in grave doubt concerning our jurisdiction to consider the order and certifies to the Supreme Court of the United States the following question of law, concerning which instruction is desired for the proper decision of the cause:

Question certified

(1) After a finding of guilt in such a criminal proceeding as the instant case, in which neither imprisonment in a jail or penitentiary nor a fine is imposed, is an order by the district
6 court, that the convicted man "be placed on probation for the period of five (5) years," a final decision reviewable on appeal by this circuit court of appeals?

CURTIS D. WILBUR,
United States Circuit Judge.
FRANCIS A. GARRECHT,
United States Circuit Judge.
WILLIAM DENMAN,
United States Circuit Judge.
BERT EMORY HANEY,
United States Circuit Judge.
ALBERT LEE STEPHENS,
United States Circuit Judge.
WILLIAM HEALY,
United States Circuit Judge.

[Clerk's certificate omitted.]

[Endorsement on cover:] File No. 47413. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 912. Fred Toyosaburo Korematsu, vs. The United States of America. Certificate. Filed April 12, 1943. Term No. 912 O. T. 1942.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 912

FRED TOYOSABURO KOREMATSU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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OCTOBER TERM, 1942

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FRED TOYOSABURO KOREMATSU,
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Appellee.

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

This is an appeal prosecuted in *forma pauperis* by the appellant, Fred Toyosaburo Korematsu, a native born citizen of the United States of America of Japanese ancestry, and a resident of Alameda County in the State of California, from a judgment of conviction and five-year probationary sentence rendered against him in the United States District Court in and for the Northern District of California in a criminal action based upon an information filed by the United States District Attorney charging appellant with the commission of a misdemeanor, to-wit, a viola-

tion of Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942. The statute is now codified as Title 18, U. S. Code, Section 97a. While the appeal was pending in the Ninth Circuit Court of Appeals the appellee filed a motion to dismiss the appeal on the ground the judgment of the District Court below, for want of a sentence to imprisonment, was not a *final decision* within the purview of Title 18, U. S. Code, Section 225(a) from which an appeal lies to Circuit Courts of Appeal. The case comes before this Court upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instruction for the proper disposition of the cause.

QUESTION INVOLVED.

Is a formal judgment of conviction entered by a District Court, sitting without a jury, which contains an unsolicited order placing the defendant on probation for a period of five years pursuant to the discretionary authority lodged in that Court by the provisions of the federal probation statute, Title 18 USCA, Section 724, in lieu of a sentence to imprisonment or the imposition of a fine, or both, authorized by Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H.R. 6758, now codified as Title 18 USCA, Section 97a, a "final decision" within the purview of Section 128 of the Judicial Code, Title 28 USCA, Section 225(a) First, from which an appeal lies to the Circuit Courts of Appeal?

STATUTES, THE CONSTRUCTION OF WHICH IS INVOLVED HEREIN.

1. Section 128 of the Judicial Code (Title 28 USCA, Section 225(a)), the construction and application of which is involved herein reads, in part, as follows:

> "Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions * * *
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

2. The federal probation statute, Title 18 USCA, Section 724, the construction of which is involved herein reads as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years."

ARGUMENT.

A SENTENCE TO PROBATION INCORPORATED IN A JUDGMENT OF CONVICTION IS A FINAL DECISION REVIEWABLE BY THE CIRCUIT COURTS OF APPEALS.

Probation is a form of punishment.

Considerable confusion reigns in judicial opinions on the proper use and legal significance of the word "judgment". It has been variously employed, and rather loosely, to signify a conviction, a sentence, a fine and probation. See 16 *Corpus Juris,* p. 1266, Sections 3001, 3002. A sentence is not a part of a judgment however but is based thereon. *People v. Rodrigo,* 69 Cal. 601, 605-606; *Plum v. Beckett,* 120 Cal. App. 507, 510; *Commonwealth v. Lockwood,* 109 Mass. 323, 12 Am. R. 699. It is sometimes described as a "judgment for imprisonment" and a fine is sometimes described as a "judgment for fine". See: *Cal. Penal Code,* Sections 1215 and 1205, and 16 *Corpus Juris,* p. 1266, Section 3001. Rule 1 of the *Rules of Criminal Procedure* (see rules following Section 688 of Title 18 USCA) recognizes the difference between a judgment of conviction and a sentence for it recites that the sentence shall be incorporated in the judgment. The word "sentence" as used therein is not to be construed as restricted to meaning a sentence to prison but as including the imposition of a fine and a placement on probation which are also authorized forms of punishment. A conviction is distinguished from a sentence, a fine and probation which are forms of punishment imposed as incidents to a judgment of conviction. It is the judicial adjudication of guilt in a criminal case. It is the judgment of conviction which estab-

lishes and publishes a defendant's guilt and brands him a criminal. A judgment is not synonymous with a jury verdict (*In re Friedrich,* 51 Fed. 747, 749, affirmed 149 U. S. 70) which is a mere finding of fact by a fact-finding body requiring a judicial act, namely, a formal entry thereon by a Court adjudicating guilt, to convert it into a judgment of conviction. See rule set forth in 17 *Corpus Juris,* p. 30, Section 3290(c). The entry of a pronouncement of guilt by a Court sitting without a jury is also a judicial act constituting a judgment of conviction. It is the adjudication of guilt, that is, the judgment of conviction and not the type of punishment thereafter imposed that establishes and publishes a defendant's guilt and brands him a criminal. *Plum v. Beckett,* supra; *Berman v. U. S.,* 302 U. S. 211, 58 S. Ct. 164; 16 *Corpus Juris* 1266-1267.

A judgment of conviction must incorporate or be followed either by one or a combination of three distinct types of penalties, namely, (1) a sentence to imprisonment, (2) the imposition of a fine or (3) a placement on probation. The two former penalties are authorized by the statute defining an offense and the latter, a placement on probation or sentence to probation, is authorized by the federal probation statute, 18 USCA 724, as a substitutive form of punishment that may be inflicted, in the discretion of the District Court, in lieu of the former types. Probation, a modern legal discovery, may be characterized as a juridical measure designed to relieve deserving convicts from the harshness of statutory penalties. It is significant that a convicted person has no choice in

the selection of any of these penalties. The choice of an appropriate type of punishment to fit the offense is a matter of discretion lodged in the trial Court. Its discretion in fixing the period of imprisonment or the amount of a fine is limited only by the maximums prescribed by the statutes violated. Its discretion in fixing the period of probation is limited to the 5 year period prescribed by the federal probation statute and its discretion in determining the "terms and conditions of probation" by the rule of reasonableness implied in the statute. The entry of either of these three forms of punishment inflicted as an incident to a judgment of conviction would seem to add thereto the element of finality necessary to support an appeal in a criminal proceeding.

A SENTENCE TO PROBATION LENDS FINALITY TO A JUDGMENT AND RENDERS IT APPEALABLE.

In *Berman v. U. S.*, 302 U. S. 211, 58 S. Ct. 164, it was decided that an appeal lies from a judgment of conviction followed by the imposition of a sentence when the execution of the sentence is suspended and a defendant is placed on probation. It is in the misconstruction of a statement in this opinion that the doubt and confusion in our lower courts has arisen as to what constitutes a "final decision" for appeal purposes. The statement is:

> "Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller v. Aderhold,* 288 U. S. 206, 53 S. Ct. 325; *Hill v. U. S. ex rel. Wampler,* 298 U. S. 460, 464, 56 S. Ct. 760, 762."

It was not decided therein that a final judgment always or necessarily means a sentence to imprisonment incorporated in or following a judgment of conviction. It does not decide whether or not the imposition of a fine substituted for a sentence to imprisonment or an unasked for sentence to probation substituted in lieu thereof following the entry of a judgment of conviction or incorporated therein is a final judgment from which an appeal lies. In the *Miller* case, cited in the opinion, a defendant entered a plea of guilty whereupon the trial Court suspended the imposition of sentence permanently and discharged the prisoner. This was declared to be a void act and as "neither a final nor a valid judgment" had been entered the cause was declared to be pending until a sentence inflicting punishment was entered. The prisoner was later recalled and a sentence was passed upon him. The case did not contain a sentence of any type whether to imprisonment, to pay a fine or to serve on probation. In the *Hill* case, cited in the opinion, it is stated that "The only sentence known to the law is the sentence or judgment entered upon the records of the court". It defines a sentence but not a final judgment and the authority it cited for its definition of a sentence was the *Miller* case where the word "judgment" was employed as a synonym for the word "sentence". Obviously where a judgment of conviction is followed neither by a sentence to imprisonment nor the imposition of a fine nor a probationary order there is no final judgment from which an appeal can be taken. In the *Berman* case this Court laid down the tests for appealability as follows:

"In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the merits" and "leaves nothing to be done but to enforce by execution what has been determined.

"Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. * * * His civil rights may be determined solely by reference to the judgment."

"Placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime'. Escoe v. Zerbst, 295 U. S. 490, 492, 493, 55 S. Ct. 819. The considerations it involves are entirely apart from any re-examination of the merits of the litigation. Probation was designed 'to aid the rehabilitation of a penitent offender'; 'to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable'. Thus probation cannot be demanded as a right. 'The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain.' Burns v. U. S. 287 U. S. 216, 220, 53 S. Ct. 154, 155. But if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication."

It would seem, by virtue of the reasons announced in the *Berman* case, that the judgment of conviction involved herein which brands the appellant a convicted criminal and contains a sentence to probation which is a recognized form of punishment imposed upon him by the district judge, under the discretionary power reposed in him by the federal probation statute, terminates the litigation between the parties on the merits and constitutes a final decision for appeal purposes within the meaning of 28 USCA 225(a). It would also seem to possess finality for appeal purposes when it is considered that the judgment of conviction and sentence to probation entered herein effectively bar the appellant from again being prosecuted for the same offense under the double jeopardy provision of the Fifth Amendment. (*Commonwealth v. McDermott,* 37 Pa. Super. 1, 6.)

In some jurisdictions, under statutory authority, an appeal is held to lie from a judgment of conviction independently of a sentence. (*State v. Law* (Ala.), 191 So. 802, 805; *Cook v. State,* 19 Ala. App. 666, 100 So. 196.) It is not unusual for an Appellate Court to affirm a judgment of conviction and to reverse and remand as to a sentence. (See *Brooks v. State,* 234 Ala. 140, 173 So. 869; *Ex parte Robinson,* 183 Ala. 30, 65 So. 177, and *Robinson v. U. S.* (CCA-6), 30 Fed. (2d) 25, 29-30.) If an appeal taken only from a sentence, fine or probationary term was permissible and successful it would not wipe out a judgment of conviction whereas a successful appeal from a judgment of conviction would wipe out the penalty inflicted which

is a mere appendage thereto. In *Starklof v. U. S.* (CCA-9), 20 Fed. (2d) 32, it was held that when a judgment of conviction has been pronounced and the Court defers the passing of sentence to the next term of Court an appeal taken before sentence is pronounced is premature. This holding appears to be correct because a judgment of conviction "setting forth the sentence" had not been signed and entered as required by Rule 1 of the Rules of Criminal Procedure. (See Rules following Sec. 688 of 18 USCA.) Had the conviction been entered as required by the rule, although wanting in a sentence, an appeal might have been held to lie therefrom under Rule 3 of the Rules of Criminal Procedure requiring an appeal to be taken from the "judgment of conviction". The language of the *Berman* case seems to suggest that an appeal might lie from the judgment of conviction whether or not a penalty has been imposed.

THE APPEAL HEREIN IS ALSO SUSTAINABLE ON SPECIAL GROUNDS.

In a number of jurisdictions it has been established that an appeal will lie from a suspended sentence where a judgment or order is deemed interlocutory on the ground that to deny an appeal would result in great injustice to a defendant. (*Commonwealth v. Trunk,* 311 Pa. 555, 167 A. 233; *Commonwealth v. Haines,* 130 Pa. Super. Ct. 196, 196 A. 621; *Commonwealth v. Smith,* 130 Pa. Super. Ct. 536, 543, 198 A. 812; *State v. Griffith,* 117 N. C. 709, 23 S. E. 164.) The

denial of an appeal to the appellant herein would result in great injustice to him and would foreclose a decision on issues of tremendous public importance. In criminal cases a void judgment is, under some authorities, sufficient to support an appeal. (*State v. Olsen* (Iowa), 162 N. W. 781; *State v. Rime,* 209 Iowa 864, 226 N. W. 925; *Chapman v. Commonwealth,* 199 Ky. 204, 250 S. W. 844, 846.) It would appear to be a reasonable conclusion that an appeal lies herein from the judgment of conviction which is based upon an unconstitutional and void statute. Another important exception to the general rule that interlocutory judgments are not appealable is that special appeals will lie therefrom in exigency cases. (See *In re Ainsworth v. U. S.,* 1 App. (D. C.) 518, 519, and *In re Gassheimer,* 24 App. (D. C.) 312, 317.) The appeal herein, whether the judgment below be deemed interlocutory or final certainly falls into the classification of an exigency case.

THE LECATO LINE OF DECISIONS.

In *U. S. v. Lecato* (CCA-2), 29 Fed. (2d) 694, 695, cited in the certificate of questions of law upon which the Ninth Circuit Court desires instruction herein, it was held that an appeal was premature for want of a proper sentence where a judgment of conviction had been entered, the imposition of sentence suspended and the defendant put on probation for a specified period on the ground that "when sentence is suspended there is no judgment from which to appeal".

In the Second Circuit a suspension of the imposition of a sentence to prison and the substitution of probation therefore is regarded as an order or judgment interlocutory in character. Similar holdings in the same Circuit following the precedent established in its *Lecato* opinion are *U. S. v. Mook,* 125 Fed. (2d) 706; *U. S. v. Albers,* 115 Fed. (2d) 833; *U. S. v. Zuckerkandal,* 66 Fed. (2d) 388, cert. den. 290 U. S. 673, and *U. S. v. Levinson,* 54 Fed. (2d) 363, cert. den. 284 U. S. 685.

In *Birnbaum v. U. S.* (CCA-4), 107 Fed. (2d) 885, 126 A. L. R. 1207, where the trial Court suspended the imposition of sentence and placed the defendant upon probation an appeal was held premature on the strength of the statement in the *Berman* case that "Final judgment in a criminal case means sentence". The Court refused to regard the order placing the defendant upon probation as a substituted form of punishment equivalent to a sentence to imprisonment or to the imposition of a fine that would lend finality to the proceeding. The Court declared, however, that the question whether the suspension of imposition of sentence to imprisonment and the substitution of an order placing a defendant upon probation finalized the proceeding for appeal purposes had not yet been decided by the Supreme Court in the following language:

> "While the exact question here presented has not been decided by the Supreme Court, great weight must be accorded the fact that in the *Berman* case, supra, that court carefully distinguished a case of this sort from one where the

sentence was imposed and only its execution suspended."

The theory upon which this line of decisions is based is that a judgment of conviction which does not contain a recital of a sentence to prison will not support an appeal because it is interlocutory and not final in nature unless followed by a sentence to imprisonment. This theory allows that the execution of an imposed sentence may be suspended and also that after its suspension the convict may be placed upon probation. Where, however, conviction is first had and a Court thereupon discharges the prisoner or suspends the imposition of sentence and discharges him, which amounts to the same thing, the Court's action is tantamount to an unauthorized dismissal of the action and being void the prisoner is subject to recall for the infliction of an appropriate punishment in accordance with the provisions of the statute violated or the probation statute. *Miller v. Aderhold,* supra. The distinction between suspending the imposition of a sentence upon conviction and placing a defendant upon probation and that of imposing a sentence to prison and thereupon suspending its execution and placing him upon probation is, in substance, a distinction without a difference. It is more apparent than real and amounts to nothing more than saying that in the former instance the probation is subject to revocation and the imposition of a sentence to prison whereas in the latter the probation is subject to revocation whereupon the sentence to prison is revived. There is an interesting summary of cases presented

in the appendix to the *Birnbaum* opinion appearing in 126 A. L. R. 1210 revealing the conflict in the authorities on the effect of suspended sentences. The conflict seems to have stemmed from the failure to consider that probation is a recognized form of legal punishment visited upon an offender in the discretion of the Court and that it is not a matter of choice in the convict.

MANDAMUS DOES NOT LIE TO COMPEL A PRISON SENTENCE.

There is a dictum in *Birnbaum v. U. S.*, supra, suggesting that if a trial Court suspends the imposition of sentence of imprisonment or fine and imposes probation and thereafter refuses to vacate its probationary order and pass sentence to imprisonment or fine when requested so to do by a defendant desiring to initiate an appeal resort may be had to mandamus or to a proceeding in the nature thereof to compel such a sentence to be imposed in order to obtain a final judgment from which an appeal will lie. This followed the view taken by the Second Circuit Court of Appeals in the *Lecato* opinion and its subsequent opinions hereinabove mentioned. The dictum also intimates that a failure of a trial Court to comply with such a request might constitute an abuse of discretion which would justify resort to such a proceeding. However, the Court failed to point out any statute or authority authorizing mandamus or proceeding in the nature of a mandamus in such a case. The federal probation statute, 18 USCA 724, lodges

an absolute discretionary power in a trial Court to suspend the imposition of sentence or fine and to substitute probation therefor. (*Burr v. U. S.* (CCA-7), 86 Fed. (2d) 502, 503; *Ex parte U. S.*, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129.) The exercise of this discretionary power cannot be construed to be an abuse of discretion. If mandamus or a similar proceeding were to lie to compel a trial judge to impose a jail sentence or fine when the probation statute gives him power not to impose it the absolute discretion vested in him by the statute would be destroyed and the statute nullified. The rule is elementary that mandamus will not lie to compel an inferior tribunal to act or exercise its discretion in a particular manner or to control its discretion when it is exercised within its legitimate jurisdiction. (*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450; *In re Parsons*, 150 U. S. 150, 14 S. Ct. 50; *Ex parte Brown*, 116 U. S. 401, 6 S. Ct. 387; *Ex parte Morgan*, 114 U. S. 174, 5 S. Ct. 825.) See also, *In re Gilbough*, 13 Fed. (2d) 462, where, in a case brought to compel a district judge to determine an application for suspension of sentence under the Probation Law, the Second Circuit Court of Appeals held mandamus did not lie to compel the district judge to exercise his discretion in a particular manner under the Probation Law since a right of review may be had by appeal under Section 128 of the Judicial Code. It states:

> "If a judge's action under the Probation Law is a matter of discretion, then, unless it is abused, there is no ground for appeal or writ."

In the instant case the trial judge exercised his discretion under the federal probation statute by ordering the appellant placed upon probation for a period of 5 years. This sentence to probation was not requested by the appellant. The trial Court and the prosecution at the time were cognizant of the fact that an immediate appeal would be taken to test the constitutionality of the statute violated. The trial Court and the parties entertained the opinion that a probationary sentence was an appealable judgment. Thereafter, while the appeal was pending, the appellant unsuccessfully moved the trial Court to resentence him to imprisonment or to impose a fine, or both, and then, if the Court saw fit, to suspend the execution thereof and order him again on probation in order to obviate the filing of a motion to dismiss the appeal. This motion together with the order denying it were thereafter incorporated in the record of the appeal by the stipulation of the parties and the order of the Ninth Circuit Court of Appeals.

Can it be said that an appeal does not lie herein where the trial Court, in a proper exercise of his discretionary power, originally sentenced the appellant to probation and, thereafter, refused to enter an imprisoning or fining sentence when his refusal was based upon the discretionary power conferred upon him by the federal probation statute? Must the appellant resort to a mandamus proceeding not authorized by any known statute or to a nebulous proceeding in the nature thereof which is nowhere defined merely to obtain a type of penal sentence differing in

degree and form from the probationary sentence already imposed upon him before he can prosecute an appeal to relieve himself from the judgment of conviction branding him a criminal?

RULE OF PROCEDURE SUSTAINS APPEAL HEREIN.

Rule 1 of the *Rules of Criminal Procedure* (see Rules following Sec. 688 of 18 USCA) requires that after a finding of guilt by the trial Court *"sentence shall be imposed without delay"* and that the *"judgment setting forth the sentence shall be signed by the judge who imposes sentence"*. The foregoing decisions of the Second Circuit appear to ignore the fact that the word "sentence" as used in Rule 1 and also in Rule 3 is a generic word meaning "punishment" and must necessarily comprehend the imposition of a "fine" and also the imposition of "probation" and is not restricted to meaning an "incarceration" in prison. They would also appear to ignore the fact that, under Rule 3 of the *Rules of Criminal Procedure, "An appeal shall be taken within five (5) days after the entry of judgment of conviction"*. The notice of appeal from a judgment of conviction incorporating an order placing a defendant upon probation must be filed within five (5) days after the entry thereof under Rule 3 or the right to appeal is waived. (*Nix v. U. S.* (CCA-5), 131 Fed. (2d) 857. See also, *Batson v. U. S.* (CCA-10), 129 Fed. (2d) 463; *Meyer v. U. S.* (CCA-5), 116 Fed. (2d) 601; *Miller v. U. S.* (CCA-5), 104 Fed. (2d) 343, cert. den.

308 U. S. 549, and rehearing denied 308 U. S. 634.) It is material to the consideration of the question involved herein that the formal judgment of conviction entered herein contains a recital of the sentence to probation in compliance with the requirement of Rule 1 and that the notice of appeal was timely filed in compliance with the requirement of Rule 3.

QUESTION CERTIFIED HAS AUTHORITY FOR ANSWER IN THE AFFIRMATIVE.

The precise question involved herein was answered in the affirmative by the Fifth Circuit Court of Appeals as observed in the certificate of questions of law upon which the Ninth Circuit Court of Appeals desires instruction herein. In *Cooper v. U. S.*, 91 Fed. (2d) 195, 199, an order placing defendants upon an unasked for probation pursuant to power lodged in the District Court by the federal probation statute following the entry of a judgment of conviction constituted a final decision for appeal purposes within the purview of Section 128 of the Judicial Code, Title 28 USCA, Section 225(a) First. The opinion states:

> "The Coopers moved the court to finally sentence them instead of suspending sentence on counts 2 to 9, inclusive, and they contend that the refusal denies them the speedy trial guaranteed by the Sixth Amendment of the Constitution. It is true that a trial is not complete until sentence is passed, and that the record cannot be held open unreasonably. But the court here evidently acted under the Probation Act, Sec. 1, 18 USCA 724,

> which expressly sanctions the suspension either of the imposition of sentence or of its execution after provided the convicted person is put on probation under the act. The probation is not pardon, either conditional or absolute, for the power of pardon is vested in the President. It is an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose. We do not agree with appellants' contention that probation, like pardon, may be refused by the convicted person. The act vests a discretion in the Court, not a choice in the convict. The probation here imposed is rather loose and informal, but is authorized by the act."

On December 23, 1942, the Fifth Circuit Court of Appeals in *Nix v. U. S.*, 131 Fed. (2d) 857, held an unsolicited order placing a defendant upon probation following a judgment of conviction was a final decision from which an appeal lies if notice of appeal is filed within the time allotted which commences to run from the date of the entry of the probationary sentence contained in the judgment of conviction. The appeal was dismissed because this notice was filed too late. The opinion recites:

> "The judgment of conviction occurred then (1937), and an appeal from it must, under Rule III for Criminal Procedure, 18 USCA, following section 688, be taken within five days, unless a motion for a new trial be made. Fewox v. U. S. (5th Cir.), 77 Fed. 2d 699; Miller v. U. S., 5th

Cir., 104 Fed. 2d 343; U. S. v. Tousey, 101 Fed. 2d 892. No provision is made for delaying appeal because of putting of the defendant on probation. Probation does not set aside the judgment of conviction, even when the imposition of sentence is suspended, because probation can only be visited on a convict, and is itself a form of mild punishment. Cooper v. U. S., 5th Cir., 91 Fed. 2d 195. If a probated convict is dissatisfied at his conviction he can and must appeal at once."

In *U. S. v. La Shagway* (CCA-9), 95 Fed. (2d) 200, a judgment of conviction had been entered containing a recital reserving the right of the trial Court to consider an application for probation to be made *in futuro*. The reservation of this right was held to be void. The order releasing the defendant on probation, granted upon his application after he had served a portion of his prison term, was declared to constitute "a final decision terminating the proceeding" from which an appeal lies. The Court declared that "An application for probation is not directed toward the final judgment of conviction (see *Benson v. U. S.*, 93 Fed. (2d) 749), but is in the nature of an independent proceeding". Probation, however, whether imposed by a trial Court at the time of conviction or granted subsequently upon an independent application made by a convict is an incident to a judgment of conviction. If the government can appeal from an order granting probation why cannot a defendant appeal from probation imposed upon him which he considers undeserved and illegally imposed upon him as a mere incident to a conviction had un-

der an unconstitutional and void statute? Can it be said that an appeal does not lie in the instant case from the judgment of conviction containing an unasked for sentence to probation but that it lies from the order sentencing him to probation? It would seem to follow that the appeal herein is sustainable not only as an appeal from the judgment of conviction below but also as an independent appeal from the sentence to probation which involves the same issues.

CONCLUSION.

If an appeal were to be held not to lie herein from an unsolicited order placing the appellant upon probation made at the time of his conviction, a trial judge, without abusing the authority lodged in him by the federal probation statute, either capriciously or unintionally could prevent appeals from his own decisions. Within the scope of the statutory authority conferred upon him he could refuse to impose an imprisoning sentence and could put a defendant upon probation for the statutory period. While the probationary period was running no appeal could be taken for lack of such a sentence. At the conclusion of the period no appeal could be taken for an imprisoning sentence would still be wanting, the trial Court's power to impose sentence would have lapsed and the defendant automatically have been released from the onus of the probationary sentence. The record, however, would still reveal a judgment of conviction branding the defendant a criminal. The defendant's reputation

would be ruined and, if the conviction were for felony, he would suffer a loss of his civil rights. He would have been deprived of the right to a fair and speedy trial and the incidents thereof guaranteed by the Sixth Amendment and of the right to vindicate himself from the stigma of crime. If appeals were declared to be allowed at the expiration of the probationary sentence our Courts would be faced with a multiplicity of appeals from convicts seeking to clear their records and there would, in truth, be no end to litigation. The question of law propounded by the Ninth Circuit Court of Appeals should be answered in the affirmative.

Dated, San Francisco, California,
May 5, 1943.

JACKSON H. RALSTON,
Attorney for Appellant.

WAYNE M. COLLINS,
Of Counsel.

INDEX

CITATIONS

5-5779—43——1

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 912

FRED TOYOSABURO KOREMATSU

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The certificate does not disclose that any opinion was rendered by the trial court.

JURISDICTION

The certificate stating a question of law upon which the Circuit Court of Appeals desires instruction for the proper decision of this case was filed on April 12, 1943. An order of this Court filed on April 12, 1943, refused the defendant's application that the court below be directed to send the entire record to this Court for decision of the whole matter in controversy. The jurisdic-

tion of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION CERTIFIED

Whether, after a waiver of a jury and a finding of guilt by the trial court and in the absence of a sentence of fine or imprisonment, an order that the "pronouncing of judgment be suspended" and that the convicted defendant "be placed on probation for a period of five (5) years" is a "final decision" reviewable on appeal by a circuit court of appeals.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 19–21.

STATEMENT

The following facts are stated in the certificate:

An information filed in the District Court for the Northern District of California charged the defendant, a person of Japanese ancestry, with having knowingly remained in the city of San Leandro, Alameda County, California, from which all such persons had been ordered excluded by General DeWitt's Public Proclamation No. 1 dated March 2, 1942, and Civilian Exclusion Order No. 34 dated May 3, 1942, issued pursuant to Executive Order No. 9066 dated February 19, 1942.[1] (C. 1–2.)

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[1] The information consequently charged a violation of the Act of March 21, 1942 (18 U. S. C. A. 97A).

The order of the District Court filed September 8, 1942, a jury having been waived and the court having found the defendant guilty, provided that (C. 2):

> * * * the defendant, Fred Toyosaburo Korematsu, be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to the said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended.

The defendant appealed from this order, and the certificate of the Circuit Court of Appeals states that the appeal was "duly taken if we have the jurisdiction to consider it." (C. 2.)

After the appeal was taken the defendant moved in the District Court "that sentence now be passed upon him." The District Court found that "no request was made for the imposition of sentence at the time of trial." The record shows no request of defendant to be placed on probation. The District Court denied the motion.

The Government, the certificate states (C. 2), has raised in the Circuit Court of Appeals the question whether the order of the District Court imposing probation without imposing sentence constitutes a "final decision," of which the Circuit Court of Appeals has appellate jurisdiction, within the meaning of Section 128 of the Judicial

Code,[2] and that is the question which the court has certified.[3]

DISCUSSION

THE DIVERGENT CONSIDERATIONS AS TO WHETHER THE ORDER OF THE DISTRICT COURT WAS APPEALABLE

The Second Circuit in a number of cases (*United States* v. *Mook,* 125 F. (2d) 706, *United States* v. *Albers,* 115 F. (2d) 833, *United States* v. *Knickerbocker Fur Coat Co.,* 66 F. (2d) 388, certiorari denied, *sub nom. Zuckerkandel* v. *United States,* 290 U. S. 673, *United States* v. *Levinson,* 54 F. (2d) 363, certiorari denied, 284 U. S. 685, *United States* v. *Messina,* 36 F. (2d) 699, *United States* v. *Lecato,* 29 F. (2d) 694[4]), and the Fourth Circuit in one case (*Birnbaum* v. *United States,* 107 F. (2d) 885) have held that an order suspending the imposition of sentence and placing the defendant on probation is not a "final decision"

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[2] This motion, and the defendant's appeal on the merits, were argued before the court below sitting *en banc* together with the cases of *Hirabayashi* v. *United States* and *Yasui* v. *United States*, Nos. 870 and 871, in which legal questions were certified to this Court and in which this Court in an order filed April 5, 1943, directed that the entire record be sent to this Court for decision of the whole matter in controversy.

[3] An order of this Court dated April 12, 1943, denied the defendant's application to bring the entire record before this Court for decision of the whole matter in controversy.

[4] This decision refers to numerous state decisions entertaining the same view.

within the meaning of Section 128 of the Judicial Code (28 U. S. C. 225) [5] and hence not appealable to a circuit court of appeals.

In a case in the Fifth Circuit, *Cooper* v. *United States,* 91 F. (2d) 195, characterized by the court below as presenting a divergence of view (C. 3, 4), the court examined into the merits of an appeal from an order suspending sentence and placing defendants on probation, but did not consider, at least specifically, the question of the appealability of the judgment.[6] If this decision may be considered as in point it is, so far as we know, the only decision which supports the appealability of such an order, except for a dictum in *Nix* v. *United States,* 131 F. (2d) 857 (C. C. A. 5), certiorari denied, March 1, 1943 (No. 664 present Term).

The question has, however, never been passed upon by this Court, although this Court has

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[5] This section so far as pertinent provides:

"(a) The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions—

"First. In the district courts [with an exception not here material]."

[6] In that case the trial court had imposed a sentence of two years on a conspiracy count and suspended the imposition of sentence on substantive counts and ordered probation. The defendants' motion for imposition of sentence on the substantive counts was denied. On appeal the defendants urged that the refusal to impose sentence denied them the speedy trial guaranteed by the Sixth Amendment. The circuit court of appeals considered the contention and affirmed, holding that the Probation Act expressly authorized the suspension of imposition of sentence.

held, upon confession of error by the Government, in the case of *Berman* v. *United States,* 302 U. S. 211, a case from the Second Circuit, that as to the related question whether an appeal may be taken from a judgment the execution of which has been suspended and the defendant placed on probation, such a judgment is a final and therefore an appealable order. In view of the great weight of authority in favor of the view that an order suspending the imposition of sentence and placing a defendant upon probation is not appealable and the learning of the judges who have espoused that view, we hesitate to question it, but the problem presented seems to us a closer one than the numerical weight of the decisions would seem to make it. We hence present the dominant considerations stated in those cases in support of the lack of appealability of such an order together with the opposing considerations, which we are inclined to think are more persuasive. We utilize primarily for this purpose the decision of Judge Parker in the *Birnbaum* case, 107 F. (2d) 885, which gives a good résumé of the arguments against appellate jurisdiction.

(1) An order suspending sentence and releasing a prisoner on probation is not a final decision because it is the mere deferring of sentence, which in a criminal case is the final judgment. "'Final judgment in a criminal case means sentence.' *Berman* v. *United States,* 302

U. S. 211, 212; *Miller* v. *Aderhold,* 288 U. S. 206, 210." (*Birnbaum,* 107 F. (2d), at 886.)

It is true that where the prosecution prevails in criminal litigation the litigation ordinarily comes to a conclusion by sentence, but the oft-repeated aphorism that the sentence is the judgment is not, it seems to us, dispositive when consideration is given to the test of finality of decisions for appeal purposes enunciated by this Court and the ineluctable premise upon which is based an order suspending sentence and placing the defendant upon probation.

In the *Berman* case this Court said that (pp. 212–213) "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined'. *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28; *United States* v. *Pile,* 130 U. S. 280, 283; *Heike* v. *United States,* 217 U. S. 423, 429." No less than does a sentence the execution of which has been suspended incident to the granting of probation, an order suspending sentence and releasing a defendant on probation places, it seems to us, the stamp of judicial approval upon a verdict or finding of guilt or a plea of guilty and hence "terminates the litigation on the merits" and leaves nothing further to be done but to carry into operation that which has been determined. Section 1 of the Probation Act

(App., p. 19) permits a court of the United States to suspend the imposition or execution of sentence and to place the defendant upon probation only "after conviction or after a plea of guilty or *nolo contendere.*" In other words, a court may grant probation and order the imposition or execution of sentence suspended only if the defendant is a "convict." *Burns* v. *United States,* 287 U. S. 216, 220, 222; *Escoe* v. *Zerbst,* 295 U. S. 490, 492. The court must have satisfied itself before placing the defendant on probation that he has properly been convicted; it must, of course, have listened to such motions urging against judicial approval of conviction as the defendant may be entitled to make, such as motions for a new trial or in arrest of judgment.[7]

Only after such motions have been disposed of and the court considers the defendant properly a "convict" may it grant probation. Although not labeled as such, an order placing a defendant upon probation and suspending sentence is, it would seem, just as much a judgment of conviction as is a sentence the execution of which has been suspended because the defendant has been placed on probation.

Placing a defendant upon probation, whether either the imposition or the execution of sentence be suspended, does not in any wise affect the

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[7] Cf. Rules I (Par. 1) and II (Par. 2) of the Criminal Appeals Rules.

finality of the "judgment" of conviction. As this Court stated in the *Berman* case (p. 213):

> Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime." *Escoe* v. *Zerbst*, 295 U. S. 490, 492, 493. The considerations it involves are entirely apart from any reexamination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain." *Burns* v. *United States*, 287 U. S. 216, 220. * * *

Nor would it seem material insofar as the finality of the "judgment" of conviction for appeal purposes is concerned, that the district court retains such control over its order that it may later pronounce a sentence if it should revoke probation. The considerations which would govern the court in this respect, as well as where, upon a revocation of probation, it vacates the suspension of execution of sentence and either carries that sentence into execution or, as is permitted by the

Probation Act, imposes a new and different sentence (Sec. 2, App., p. 21), are of the same character as those which motivated it when it granted probation. Probation is revoked and a sentence is carried into execution solely because the defendant, by his conduct, has breached the trust reposed in him by the district court and has shown himself no longer worthy of receiving the benefits accorded him under the Probation Act. No reconsideration of the merits of the litigation is involved, and an appeal from such an order presents only the question whether there has been an abuse of discretion in revoking probation. *Burns* v. *United States,* 287 U. S. 216, 222; *Escoe* v. *Zerbst,* 295 U. S. 490, 493. No questions involving the merits of the litigation are raisable on such an appeal. *Nix* v. *United States,* 131 F. (2d) 857 (C. C. A. 5), certiorari denied, March 1, 1943 (No. 664, present Term). Control is retained by the district court over its probation order solely to accomplish the objects and purposes of the probation statute. As was pointed out by this Court in the *Burns* case (p. 222):

> [The defendant while on probation] is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly

granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

(2) Until sentence is imposed the whole matter of punishment rests in the court's discretion. *Birnbaum*, p. 886. But the finality of a judgment for appeal purposes does not depend upon the punishment or the terms of punishment. The question is simply whether the merits of the litigation have been concluded, leaving no such questions open for the future. Even where a sentence has been entered but execution has been suspended, and later probation is revoked, the court may enter a different sentence (Sec. 2, App. p. 21).

(3) Where sentence is suspended it can be pronounced at any time during the period of probation and hence the order is not final. *Birnbaum*, p. 886. In addition to what has been said as to the test of finality of a judgment for appeal purposes, the premise of the observation is not accurate. So long as a defendant observes the terms and conditions of his probation there is no authority in the Probation Act for sentencing and imprisoning him. He may be sentenced only if he violates his probation, and then he is entitled to notice and an opportunity to be heard as to revocation. *Escoe* v. *Zerbst, supra.*

(4) "Appeal at this stage of the proceedings [i. e., from an order suspending sentence and

placing the defendant upon probation] would be fragmentary and would deny to the appellate court the advantage of having before it the complete disposition of the case by the court below. The importance of this can be readily appreciated when it is remembered how often error with respect to one count in an indictment is held to be harmless in view of concurrent punishment imposed under another count. Congress has indicated no intention to permit such fragmentary appeals in criminal cases." *Birnbaum,* p. 886. With one exception which has nothing to do with the merits of the litigation, an appeal obviously would be no more fragmentary where sentence is suspended and the defendant placed on probation than where the court pronounces sentence, suspends its execution, and grants probation.[8] In both cases all claims of error arising during the trial of the criminal litigation would be open on appeal. In both cases those questions which arose out of any subsequent revocation of probation would, of course, be the subject of another appeal. (See p. 10, *supra.*) The doctrine of harmless error in view of concurrence of punishment under another count is without application even where a sentence is pronounced if its execution has been suspended. Such a sentence on a particular count would clearly not support a sentence on another

[8] The exception is, of course, where the sentence exceeds that permitted by the statute.

count which is required to be executed. The convict is not serving his sentence while on probation.

(5) It cannot be denied, as was pointed out in the *Birnbaum* case, pp. 886–887, that this Court in the *Berman* case distinguished the case before it, where only the execution of sentence was suspended, from a case such as this where the imposition of sentence is suspended, and that it also stated that "To create finality it was necessary that petitioner's conviction should be followed by sentence." Undoubtedly this Court felt it necessary, or at least advisable, to distinguish the two types of cases because of the line of decisions which holds that an order such as that in the instant case is not appealable. We are, of course, more concerned with the Court's statement that conviction must be followed by sentence to create finality. The statement would not seem to have been necessary to a decision of the case before it since, of course, there was a sentence in that case. In any event, in view of the basic premise which underlies any order placing a defendant upon probation, i. e., that it is a confirmation judicially of his status as a convict (see pp. 7–8, *supra*), the Court's statement should, we believe, be subjected to reexamination.

(6) The *Birnbaum* decision (p. 887) quotes from Judge Learned Hand's opinion in the *Lecato* case, the first of the line of Second Circuit cases, thereafter followed by that court without further exposition, as follows:

> when sentence is suspended there is no judgment from which to appeal. This has been substantially the uniform ruling whenever the question has arisen, in the absence of some statute allowing an appeal [citing a number of state cases] * * * When Congress passed the Probation Law it must be understood to have intended the system so established to be construed in the same sense as it had been in the states from which it was borrowed.

There is, however, nothing in the Probation Act itself which deals in any way with the appealability of the orders which it authorizes, and we have found nothing in its legislative history which indicates in any wise that Congress when it enacted that statute was concerned with such a question.

(7) In concluding his opinion in the *Birnbaum* case, Judge Parker said (p. 887):

> Upon the oral argument, we were impressed, or at least the writer was, by the fact that release under probation necessarily involves a limitation upon the liberty of the accused, and also by the importance of securing a prompt review of the errors alleged to have been committed upon the trial. Further consideration, however, has convinced us that little weight should be given these considerations. An accused whose liberty is limited pending sentence is certainly in no worse case than an accused deprived of his liberty pending trial. Ordinarily he welcomes the opportunity to have sentence suspended and to be admitted

> to probation. If he objects to probation and desires a sentence from which he can appeal for the purpose of reviewing the trial, all that he need do is ask that sentence be imposed. It is true, as argued, that the statute vests in the trial judge discretion either to suspend the sentence or merely to suspend its execution; but it would unquestionably amount to an abuse of the discretion thus vested for the judge to refuse to impose sentence when requested by one who desired a final judgment from which he might prosecute an appeal. Such an abuse of discretion could be corrected by mandamus or by proceeding in the nature thereof. There is little danger, however, that trial judges will refuse to pronounce final judgments from which appeals can be prosecuted, where parties desire to appeal. The danger is rather that the efficiency of the system of appellate review provided by statute may be appreciably impaired if fragmentary appeals in criminal cases are permitted.

This presents more an argument of convenience than a discussion of the convict's right as a matter of law. Of course if an order such as that in the instant case is appealable as a final judgment of conviction, the convict has a right of appeal without demanding that sentence be imposed upon him. And there are considerations of convenience equally pressing why he should have a right of appeal just as much as the convict who has a sentence pronounced but instantly suspended

as a step in granting probation. He, like his companion in crime, has been branded a convict by the action of the court in judicially confirming guilt and placing him on probation. Except for the fact that the latter knows what his sentence *may be* if he violates probation, the two suffer the same kind of punishment while on probation, a punishment described in the *Cooper* case, in the Fifth Circuit, as "ambulatory punishment." Nevertheless, assuming, of course, that he has no right of appeal, the convict with the suspended sentence may never be in a position to question the validity of his conviction since he may behave himself within the period of probation and consequently never receive a sentence. But whether he does or not he should be entitled to the same prompt review of the errors alleged to have been committed at his trial as this Court has held that his brother criminal may have. The convict cannot force the imposition of sentence, since the Probation Act gives to the district judge the discretion as to whether he shall grant probation. *Cooper* v. *United States,* 91 F. (2d) 195, 199 (C. C. A. 5). The Act likewise gives the District Judge the discretion as to whether, in granting probation, he shall pronounce sentence and then suspend its execution or whether he shall refrain from pronouncing sentence. Presumably, in determining what he shall do in this connection, the district judge is to be actuated, as the statute indicates

(Sec. 1, App. 19), by what appear to be "the ends of justice and the best interests of the public, as well as the defendant." As is pointed out by the Fourth Circuit itself in *Riggs* v. *United States*, 14 F. (2d) 5, 9–10, certiorari denied, 273 U. S. 719, it may be "especially desirable and humane, by reason of affliction, infirmity, sex, or age of the particular defendant" that there be a suspension of imposition of sentence rather than the announcing of sentence and the suspension of its execution. In order to allow a defendant his right of appeal it would certainly seem that a district judge should not be required to abdicate the discretion which the Probation Act reposes in him in order to accomplish its beneficent aims and purposes.

(8) Presumably this Court in establishing in its Criminal Appeals Rules the time limit for appeals in criminal cases (Rule III) was thinking of a judgment of conviction in the ordinary sense of a sentence (cf. Paragraph 3 of Rule III, Rules V and VI). But Section 2 of the statute authorizing this Court to promulgate the rules specifically provides that "The right of appeal shall continue in those cases in which appeals are now authorized by law * * *." 18 U. S. C. 688. If an order placing a defendant upon probation and suspending sentence is a final judgment and therefore appealable under Section 128 of the Judicial Code, the situation is simply that, as was true of a failure to make provision in the rules with

reference to another type of order, there "is a *casus omissus* which left in full force § 8 (c) of the Judiciary Act of February 13, 1925, 28 U. S. C. § 230, which requires application for the allowance of appeals to the Circuit Court of Appeals to be made within three months after the entry of the order appealed from." *U. S. ex rel. Coy* v. *United States*, 316 U. S. 342, 345. We are not here concerned with whether the proper mode of appeal was followed since the certificate of the Circuit Court of Appeals states that the appeal was "duly taken if we have the jurisdiction to consider it" (C. 2).

CONCLUSION

The question certified is submitted upon a presentation of the divergent considerations. We think the order of the district court was appealable.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

EDWARD J. ENNIS,
Director, Alien Enemy Control Unit.

JOHN L. BURLING,
W. MARVIN SMITH,
Attorneys.

MAY 1943.

APPENDIX

Section 128 of the Judicial Code (28 U. S. C. 225) provides:

> (a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts (with an exception not here material.) * * *.

Section 1 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (18 U. S. C. 724), provides:

> SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation, the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Section 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1260, as amended June 16, 1933, c. 97, 48 Stat. 256 (18 U. S. C. 725), provides:

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer, while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued.

Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

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SUPREME COURT OF THE UNITED STATES.

No. 912.—October Term, 1942.

Fred Toyosaburo Korematsu *vs.* The United States of America. } On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[June 1, 1943.]

Mr. Justice Black delivered the opinion of the Court.

Korematsu was found guilty by the District Court for the Northern District of California of remaining in the City of San Leandro, California, in violation of 18 U. S. C. § 97(A) and the orders issued thereunder.[1] The District Court's order was that he "be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended."

The defendant appealed to the Circuit Court of Appeals for the Ninth Circuit which, under 28 U. S. C. § 225 has "jurisdiction to review by appeal final decisions." The Circuit Court of Appeals, doubting whether it had jurisdiction to hear an appeal from an order placing the defendant on probation without first formally sentencing him, has certified to us the following question under § 239 of the Judicial Code:

"After a finding of guilt in such a criminal proceeding as the instant case, in which neither imprisonment in a jail or penitentiary nor a fine is imposed, is an order by the district court, that the convicted man 'be placed on probation for the period of five (5) years' a final decision reviewable on appeal by this circuit court of appeals?"

The federal probation law authorizes a district judge "after conviction or after a plea of guilty or nolo contendere . . . to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such

[1] The relevant orders are Executive Order 9066, Feb. 19, 1942, 7 Fed. Reg. 1407, and General DeWitt's Public Proclamation No. 1, March 2, 1942, and Civilian Exclusion Order No. 34, May 3, 1942, issued under authority of the Executive Order.

terms" as seem wise. 18 U. S. C. § 724. In *Berman* v. *United States*, 302 U. S. 211, we held that when a court had imposed a sentence and then suspended its execution, the judgment was final and would support an appeal. The question here is whether the judgment is equally final when the imposition of sentence itself is suspended and the defendant subjected to probation.[2] The government concedes that this question should be answered in the affirmative.

It has often been said that there can be no "final judgment" in a criminal case prior to actual sentence, *Miller* v. *Aderhold*, 288 U. S. 206, 210; *Hill* v. *Wampler*, 298 U. S. 460, 464, and this proposition was restated in *Berman* v. *United States*, 302 U. S. 211, 212.[3] In applying this general principle to a situation like that of the instant case, the Second and Fourth Circuit Courts of Appeal have concluded that they lacked jurisdiction to hear an appeal from an order placing a defendant on probation without first imposing sentence. *United States* v. *Lecato*, 29 F. 2d 694, 695; *Birnbaum* v. *United States*, 107 F. 2d 885. The Fifth Circuit appears to take the opposite view. *Nix* v. *United States*, 131 F. 2d 857.

The "sentence is judgment" phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control. Thus in *Miller* v. *Aderhold*, *supra*, imposition of sentence was suspended and the defendant was put under no obligation at all. Hence the Court held that there was no jurisdiction to hear the appeal. But certainly when discipline has been imposed, the defendant is entitled to review.

In the *Berman* case, *supra*, we held that the appeal was proper where the sentence was imposed and suspended, and the defendant was placed on probation. The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the orders of the court. He must obey the terms and conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may,

[2] For the background of the probation legislation see Ex parte United States, 242 U. S. 27; United States v. Murray, 275 U. S. 347. Cases on the instant problem are collected at 126 A. L. R. 1207.

[3] "Final judgment in a criminal case means sentence. The sentence is the judgment."

during the probationary period, be required to pay a fine, or make reparation to aggrieved parties, or provide for the support of persons for whom he is legally responsible. 18 U. S. C. § 724. He is under the "supervision" of the probation officer whose duty it is to make reports to the court concerning his activities, 18 U. S. C. § 727, and at "any time within the probation period the probation officer may ~~issue a warrant~~, or the court which has granted the probation may issue a warrant for his arrest." 18 U. S. C. § 725. These and other incidents of probation emphasize that a probation order is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline." *Cooper* v. *United States*, 91 F. 2d 195, 199.

The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. Probation, like parole, "is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency", *Zerbst* v. *Kidwell*, 304 U. S. 359, 363, and this end is served in the same fashion whether or not probation is preceded by imposition of sentence. In either case, the liberty of an individual judicially determined to have committed an offense is abridged in the public interest. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Berman* v. *United States*, *supra*, 212, 213. Here litigation "on the merits" of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public.

These considerations lead us to conclude that the order is final and appealable. Our answer to the question is Yes.

v arrest the probationer wherever found, without a warrant,